Small Business
ALLIANCE FOR FAIR UTILITY DEREGULATION

EX PARTE OR LATE FILED

ORIGINAL

May 23, 2003

HAND DELIVERY

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W
Room 8-B201
Washington, D.C. 20554

Re: *Ex Parte* Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Act Analysis for 2002 Biennial Review
Review of FCC Broadcast Ownership Rules (MB Dkt. 02-277)

Dear Commissioner Martin:

Ensuring Federal agencies' compliance with the Regulatory Flexibility Act ("RFA") compliance is central to the mission of the Alliance for Small Business Regulatory Fairness.

In summary, the FCC's on-going proceedings apparently designed to significantly scale back on media cross-ownership rules affecting television, radio, and newspaper businesses nationwide falls far short of meeting the RFA's important requirements. That law is designed to ensure a federal agency's careful consideration of the impacts of, and alternatives to, its proposed rule on small businesses and other small entities. We urge the FCC to act in a more deliberate fashion in this important rulemaking, and to take the time to comply with important legal requirements governing agency rulemaking, including the Administrative Procedure Act as well as the RFA.

If the FCC cuts back on its cross-ownership restrictions, large, nationwide media companies will be able to take increased shares of national and local media markets. Indeed, these mega-companies appear to comprise some of the main supporters of these regulatory changes. Such a rulemaking represents a big step for the FCC, and it appears likely to affect many small media companies, as well as other small businesses and entities whose operations, such as advertising, require business dealings with television, radio, and newspaper companies in their communities. It should also not be forgotten that the RFA also requires consideration of the impacts of a proposed regulation on small communities, which are often served by local-based media outlets.

The Alliance is concerned because the FCC's proposed rules nowhere set forth what the Agency is proposing to do, except in the most general of terms, when it

explains that the Telecommunications Act of 1996 requires it to "either repeal, retain, or modify" its broadcast ownership rules every two years. 67 Fed. Reg. at 65773. It is illegal for the FCC to proceed with a rulemaking based on such a vague proposed rule.

In an April 9, 2003, letter, the Small Business Administration's Chief Counsel for Advocacy Thomas M. Sullivan explained very well why this Agency will violate the RFA and the Administrative Procedure Act if it goes forward with changes to its cross-ownership rules without ever putting any specific proposals out for public comment. We adopt the arguments made by Chief Counsel as the Alliance's own.

The FCC's failure to set forth any actual proposed rules leaves those in the regulated community grasping at straws to try to determine how the FCC's ultimate course will affect them. Not just media companies will be affected by such a rulemaking. What happens to advertising rates with media consolidation? Will an advertiser have to pay for time or space on stations or in papers that it is not intending to reach because the media parent is selling time or space as a block? Will local ads on "free TV" become a thing of the past? Even the Commission is asking these kinds of questions in the proposed rule. On this record, it is possible for commenters to line up "for" or "against" greater media consolidation, but the rest is guesswork. The FCC's requests for comments on other elements of the proposed rulemaking, such as its paperwork requirements, are equally hollow.

Significantly, however, the large majority of media companies affected by the proposed rules are, by the FCC's own account, small entities. Specifically, the FCC estimates that small businesses and entities comprise approximately: (1) 870 of 1,250 commercial television broadcast stations, (2) 10,800 of 11,320 commercial radio stations, (3) well over 1,000 small cable company operators, (4) 1,595 of approximately 2,000 multipoint distribution service, multi-channel multipoint distribution service, and local multipoint distribution service companies, (5) a "substantial number" of the over 5,000 satellite master antenna television systems, (6) 8,620 of 8,758 daily newspapers and many newspapers publishing less frequently than daily. 67 Fed. Reg. at 65774-65776.

The Regulatory Flexibility Act requires a proposing agency to prepare both an initial regulatory flexibility analysis and a final regulatory flexibility analysis. The SBA's Office of Advocacy has explained the types of considerations that should be included in an adequate initial regulatory flexibility analysis. They can include:

> Impacts examined may include economic viability (including closure), competitiveness, productivity, and employment. The analysis should

> identify cost burdens for the industry sector and for the individual small entities affected. . . . The agency must also consider alternatives to the
>
> proposed regulation that would accomplish the agency's goals while not disproportionately burdening small businesses.

U.S. Small Business Administration Office of Advocacy, "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies" (Nov. 2002), at 30.

> Further, the Office of Advocacy has explained that:
>
> The results of the [IRFA] analysis should allow interested parties to compare the impacts of regulatory alternatives on the differing sizes and types of entities targeted or affected by the rule. It will enable direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a targeted subsector. Furthermore, the analysis will examine whether the alternative is effectively designed to capture benefits to the public.

Id. at 31.

The FCC prepared an analysis it claims represents an initial regulatory flexibility analysis. It is set forth at 67 Fed. Reg. at 65773-65776. Despite the many affected small entities identified in the proposed rule, the FCC has not begun to undertake the kind of specific analyses of a proposed rule that the Office of Advocacy has explained that an agency is supposed to undertake. Regarding alternatives, for instance, the FCC asks whether it should retain the current cross-ownership regime or adopt a uniform cross-ownership rule, but it has not specified what such a uniform rule might be. 67 Fed. Reg. at 65776. It is valuable to gain insight from the regulated community by asking such broad questions, but such an approach cannot substitute for a legally adequate proposed rule process. As Chief Counsel Sullivan has explained, the FCC could not have undertaken such an initial regulatory flexibility analysis because it has not set forth any specific proposals regarding which an adequate initial regulatory flexibility analysis could be conducted.

For the above-stated reasons, we respectfully submit that the FCC should treat its previous proposed rules as a notice of intent to engage in rulemaking and to issue a further notice of proposed rulemaking, so that it can garner informed comments and undertake the RFA and other analyses that Federal law requires.

Small Business
ALLIANCE FOR FAIR
UTILITY DEREGULATION

Respectfully submitted,

Susan Hager

Susan Hager